Filed 8/29/06 Hornibrook v. Hornibrook CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CHRISTINE INEZ HORNIBROOK, as Trustee, etc.,

Plaintiff and Appellant,

v.

VIRGINIA LEE HORNIBROOK,

Defendant and Respondent.

E036430

(Super.Ct.No. SPRSS03421)

OPINION

APPEAL from the Superior Court of San Bernardino County. Phillip M. Morris and David A. Williams, Judges.[1] Affirmed in part and reversed in part with directions.

Ward & Ward and Alexandra S. Ward for Plaintiff and Appellant.

Law Offices of Harry E. Brown & Associates, Jeffrey S. Bertram; Skoretz & Church and Lenita A. Skoretz for Defendant and Respondent.

[1] The trial was bifurcated. Judge Morris adjudicated the first phase; Judge Williams adjudicated the second phase.

Lee and Virginia Hornibrook married relatively late in life, only months before Lee retired. The couple lived primarily off of Lee's separate property assets and income.

Lee's estate plan (the key element of which was a living trust) provided for Virginia to receive an income and other benefits after his death. However, Lee had two adult children from a previous marriage and, as is not uncommon under such circumstances, he provided for them more generously than he did for Virginia.

Upon Lee's death, his daughter Christine (Chris) Hornibrook became the trustee of the trust. She sought to carry out the trust according to its terms. Virginia, on the other hand, sought to avoid complying with the terms of the trust. She resisted moving out of the house in which she and Lee had lived; she asserted community property and other claims to trust property; and -- most significant for our purposes -- she refused to convey a certain recreational vehicle (RV) to the trust, as the trust purported to require, claiming it belonged to her.

Chris accused Virginia of violating the no contest clause in the declaration of trust. As a result, the merits of these sundry disputes are not germane to this opinion. What matters is that Chris, rightly or wrongly, was trying to enforce the trust, while Virginia, rightly or wrongly, was trying to defeat it. We will hold that Virginia, by asserting, in court, that the condition of the trust that purported to require her to convey the RV to the trustee was invalid, violated the no contest clause. Accordingly, although she may be able to keep the RV, she must forfeit the income and all other benefits that Lee intended to give her through the trust.

We will further hold that the trial court erred by excluding evidence Chris offered in opposition to Virginia's claim of a community property interest in the house.

I

FACTUAL BACKGROUND

Lee and Virginia were married on February 14, 1993. This was a third marriage for each of them. Lee had two adult children from a previous marriage, Chris and Randall (Randy) Hornibrook.

Before the marriage, Lee had acquired a house in San Bernardino, as his separate property. Throughout the marriage, Lee and Virginia lived in the house.

Also before the marriage, Lee had two bank accounts -- a checking account at Wells Fargo, and a savings account at Life Savings. Lee made Chris a signer on the Wells Fargo account so she could pay bills for him when he was on vacation. In contemplation of the marriage, Lee added Virginia as a signer on both accounts.

In 1993, both Lee and Virginia worked and received earnings, which were community property. In September 1993, Lee retired. Virginia had sustained a work-related injury, and in 1993 or 1994 she received disability payments and $5,000 in worker's compensation, which were also community property. Thus, the couple lived mainly off of Lee's separate property assets and income, which consisted of commercial real estate, retirement benefits, social security, and an inheritance. All of this income, whether separate or community, went into the Wells Fargo checking account (except for the $5,000 worker's compensation payment, which went into the Life Savings account).

From 1995 through 1997, Lee and Virginia operated a business selling Shaklee products. However, in 1996 and 1997, at least according to their tax returns, the business produced net losses. Some of the money in the Wells Fargo account came from the Shaklee business.

In 1996, Lee bought a Saturn automobile and an RV. He paid for them by moving money from the Life Savings account into the Wells Fargo account, then writing a check on the Wells Fargo account. He took title to the RV in his name.

On February 14, 1997, Lee executed his estate plan documents; he amended them twice before he died. The estate plan consisted primarily of a declaration of trust, which provided for a revocable living trust and a testamentary trust. It also included a will, but the will merely poured over any remaining assets into the trust.[2]

Lee was the trustee of the living trust; Chris was the successor trustee. During his life, Lee was the sole beneficiary. Upon his death, specified trust assets were to be distributed to specified beneficiaries. Virginia could stay in the house for up to a year, but then it was to go to Chris. Lee's personal effects were to be divided in specified fashion among Virginia, Chris, and Randy. Lee also made some minor specific bequests.

Concerning the RV, the declaration provided: "I give [the RV] and all its contents to [Randy], while reserving a life estate . . . to [Virginia] . . . . She is to use it as long as she is alive, not remarried, co-habiting, or unable to care for herself. . . . Randy is to be

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[2] Apparently Lee also provided for Virginia by making her the beneficiary of some life insurance, in an amount not shown by the record.

able to use the motor home for up to 4 weeks during the year." The declaration also included the following (RV condition): "Before the testamentary trust is funded and any income distributions can take effect for [Virginia], the [RV] must be conveyed to and registered in the name of the trust."

The rest of the assets in the living trust would then go to the testamentary trust. Chris was the trustee of the testamentary trust. The income of the testamentary trust was to be paid to Virginia, up to a maximum of $3,000 per month (minus any Social Security benefits she might receive); or, in lieu of such monthly payments, she could elect to receive a one-time payment of $50,000. Upon Virginia's death, the assets of the testamentary trust were to be distributed to Chris and Randy.

The declaration included a no contest clause, which provided: "The distributions designated in this trust are intended to be in lieu of any other claims, of whatever nature and whether arising by statute or otherwise, by any taker hereunder, and any taker who asserts any other claim or contests this trust shall forfeit all interest in any property, income or other benefit to him/her."

The declaration also provided: "The successor trustee(s) shall not . . . be required to make accountings or reports to any court."

Lee transferred all of his assets to the living trust. He reregistered the RV a number of times, initially in the name of the trust, but eventually in the name of himself "or" Virginia. The Saturn was likewise registered in the name of Lee "or" Virginia.

In 1997-1998,[3] Lee and Virginia remodeled the house. The work was paid for out of the Wells Fargo account.

In Virginia's opinion, the remodeling increased the value of the house from $120,000 to $155,000, i.e., a total of $25,000. In the opinion of Chris's expert appraiser, however, most of the work done involved "maintenance issues" and matters of personal taste; the only items that actually added value were dual-pane windows and a recreational vehicle parking pad, which added a total of $4,000.

On May 6, 1999, Virginia reregistered the RV and the Saturn in her own name. She testified that Lee gave her permission to do so. However, she also admitted that he was in a coma at the time of the transfer. She explained that the registration on both vehicles was up for renewal, and it was easier to put them in her name then than to do so after Lee died.

Lee died on May 14, 1999. Virginia believed that the RV belonged to her and hence that the RV condition was invalid. She therefore refused to convey the RV to the trust.

II

PROCEDURAL BACKGROUND

On August 13, 1999, Chris began this proceeding by filing a petition to compel Virginia to turn over specified personal property.

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[3] The trial court found that the work was done in 1996-1997. According to documentary evidence, however, it was done in 1997-1998.

On October 12, 1999, Virginia filed a petition for a determination that certain actions she proposed to take would not violate the no contest clause. (See Prob. Code, § 21300 et seq.) On May 19, 2000, the trial court ruled that some of these actions would violate the no contest clause. However, it also ruled that a petition to determine Virginia's community property interest in a trust asset would *not* violate the no contest clause.

On July 26, 2000, Chris filed a petition seeking, among other things, to compel Virginia (1) to vacate the house, and (2) to turn over the RV and the Saturn.

On December 5, 2000, Virginia filed a petition (Virginia's petition) seeking, among other things, (1) a determination of her community property interest in the house, or, alternatively, a life estate in the house; (2) an accounting; and (3) either (a) monthly income payments from the trust, or (b) an annuity or a lump-sum payment, as a substitute for the monthly income payments to which she was entitled.

A. *The First Phase of Trial*.

In her trial brief, Christine argued that Virginia's petition violated the no contest clause, by seeking an accounting, by seeking an annuity and/or a lump-sum payment, and by seeking to enforce the trust despite Virginia's failure to convey the RV.[4] She further argued: "The evidence at trial is expected to establish other examples . . . ."

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[4] Before Virginia had even filed her Petition, Chris sought a declaration that Virginia had already violated the no contest clause. In this appeal, however, Chris does not claim that Virginia violated the no contest clause in any way other than by filing and litigating her Petition. Accordingly, we do not consider any other potential violations.

Virginia responded: "The [RV] is Virginia's sole and separate property by operation of law. . . . Pursuant to Probate Code Section 17200(3)[,] which provides that beneficiaries can request that the Court determine the validity of a trust provision, the clause requiring a beneficiary to place a solely owned asset into the trust before the trust can begin to operate should be deemed invalid and removed from the trust."

Chris then argued that Virginia had further violated the no contest clause by asking the trial court to invalidate the RV condition.

On Chris's motion, the trial court bifurcated all issues concerning the no contest clause and the RV condition and ordered them tried first. On September 17, 2002, it heard evidence. On November 8, 2002, after hearing argument, it ruled orally that Virginia had not violated the no contest clause and that the RV condition was a valid condition precedent. It ordered Virginia to convey the RV within 30 days or forfeit all of her rights in the trust.

On March 18, 2003, the trial court issued a written decision. In it, it explained that Virginia had not violated the no contest clause because: "Ca Probate § 17200 allows Virginia to request direction from the Court. The Code specifically grants the beneficiary of a trust the right to petition the court concerning the internal affairs of the trust. [A]s a beneficiary of the trust, Virginia's petition, under Ca Probate § 17200, did not violate the 'no contest' clause." (Capitalization altered.) It further ruled that the RV condition was "an express condition precedent" and that it was "valid and enforceable."

B. *The Second Phase of Trial*.

The parties agreed that the only issue remaining to be tried was the nature and extent of Virginia's interest in the house and in the Saturn.

On October 15, 2003, the trial court heard evidence. At the end of the hearing, it discussed some of the legal issues, ordered the parties to submit further briefs, and continued the matter.

On December 3, 2003, the trial court heard argument, then ordered the parties to submit yet further briefs. Over Chris's objection, it ordered the case closed to evidence.

On January 21, 2004, the trial court issued a written decision. It ruled that the Saturn belonged to Virginia. It further ruled that the Wells Fargo account contained both separate and community funds, that Chris had not adequately traced the money spent on the improvements, and that therefore Virginia was entitled to reimbursement in the amount of $8,513.59.

On April 14, 2004, Chris filed objections to Virginia's proposed judgments.[5] On May 7, 2004, the trial court overruled the objections. It then entered two separate judgments -- on May 12, 2004, it entered judgment on the second phase of trial, and on June 28, 2004, it entered judgment on the first phase of trial. Chris filed a notice of appeal that was timely with respect to both judgments.

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[5] Apparently Virginia had served proposed judgments on Chris but had not yet submitted them to the trial court.

III

THE NO CONTEST CLAUSE

Chris contends that, in the first phase of trial, the trial court erred by ruling that Virginia had not violated the no contest clause.

Preliminarily, Virginia argues that this is an "untimely attempt to take a second shot and appeal the Probate Court's decision on Virginia's petition under the provisions of Probate Code §§ 21320-21322 . . . ." (Italics omitted.) Probate Code "section 21320 provides . . . a 'safe harbor' for beneficiaries who seek an advance judicial determination of whether a proposed legal challenge would be a contest." (*Genger v. Delsol* (1997) 56 Cal.App.4th 1410, 1428-1429.) A ruling under Probate Code section 21320 is an appealable order. (Prob. Code, §§ 1303, subd. (j) [estates], 1304, subd. (d) [trusts].)

Virginia's safe-harbor petition sought a ruling that certain specified actions would not violate the no contest clause. One such action was requesting a determination of her community property interest in trust property. The trial court ruled that such a request would not violate the no contest clause. Chris did not appeal that ruling. Thus, it is now final and res judicata. (*In re Matthew C.* (1993) 6 Cal.4th 386, 393.) However, Virginia did not seek a ruling on any of the *other* requests that she later made in connection with her petition -- requests that Chris immediately claimed were violations of the no contest clause. We therefore turn to the merits of this argument.

The law concerning no contest clauses is the same with respect to trusts as it is to wills. (*Estate of Ferber* (1998) 66 Cal.App.4th 244, 253, fn. 7; *Scharlin v. Superior*

Court (1992) 9 Cal.App.4th 162, 169; see Prob. Code, §§ 45, 21300 et seq.) Accordingly, in this discussion, we will refer to wills and trusts, and to testators and trustors, interchangeably.

"No contest clauses are valid in California and are favored by the public policies of discouraging litigation and giving effect to the purposes expressed by the testator. [Citations.] Because a no contest clause results in a forfeiture, however, a court is required to strictly construe it and may not extend it beyond what was plainly the testator's intent. [Citations.]

"'Whether there has been a "contest" within the meaning of a particular no-contest clause depends upon the circumstances of the particular case and the language used.' [Citations.] '[T]he answer cannot be sought in a vacuum, but must be gleaned from a consideration of the purposes that the [testator] sought to attain by the provisions of [his] will.' [Citation.] Therefore, even though a no contest clause is strictly construed to avoid forfeiture, it is the testator's intentions that control, and a court 'must not rewrite the [testator's] will in such a way as to immunize legal proceedings plainly intended to frustrate [the testator's] unequivocally expressed intent from the reach of the no-contest clause.' [Citation.]" (*Burch v. George* (1994) 7 Cal.4th 246, 254-255, fn. omitted, quoting *Estate of Watson* (1986) 177 Cal.App.3d 569, 572 and *Estate of Kazian* (1976) 59 Cal.App.3d 797, 802.)

The no contest clause in this case disinherited "any taker who asserts any other claim or contests this trust . . . ." In general, a "contest" has been defined as "any legal

proceeding designed to result in the thwarting of the testator's wishes as expressed in his will. [Citations.]" (*Estate of Friedman* (1979) 100 Cal.App.3d 810, 817-818; accord, *Burch v. George*, *supra*, 7 Cal.4th at pp. 263.) A contest includes "a pleading in a proceeding in any court that indirectly challenges the validity of an instrument or one or more of its terms . . . ." (Prob. Code, § 21300, subd. (c).)

In this appeal, Chris contends that Virginia violated the no contest clause in several ways, including by seeking an accounting, by seeking an annuity or a lump sum in lieu of income distributions, by seeking income distributions at all (i.e., despite not having conveyed the RV), and by seeking to invalidate the RV condition. We consider only the fact that Virginia sought to invalidate the RV condition, because, as we will conclude, it is dispositive.

Virginia's attempt to invalidate the RV condition was a contest within the meaning of the no contest clause. It challenged the validity of one of the terms of the trust. Moreover, it was asserted on the premise that the RV belonged to Virginia. Under the terms of the trust, however, Virginia was to have only a life estate in the RV; she was to lose the use of it if she remarried, cohabited, or lost the ability to care for herself; Randy was to have the use of it for four weeks a year; and it was to go to Randy at Virginia's death. Thus, Virginia's attempt, if successful, would have thwarted Lee's intent. Indeed, Virginia does not argue otherwise.

Virginia argues only that (as the trial court ruled) Probate Code section 17200 allows a beneficiary of a trust to "petition the court . . . concerning the internal affairs of

the trust or to determine the existence of the trust." (*Id*., subd. (a).) Chris retorts that Virginia's petition did not state that it was filed pursuant to section 17200 and did not even cite that section. We may assume, without deciding, that Virginia's petition was filed pursuant to Probate Code section 17200. We do not believe, however, that that would take it outside the no contest clause. The trial court did not explain why it would; Virginia's brief does little to fill in the gap. We can imagine only two even arguable reasons.

First, the trial court may have reasoned that, by proceeding under Probate Code section 17200, Virginia was merely seeking to ascertain the terms of the trust. "'[S]eeking an interpretation of a will does not in and of itself constitute an attempt to thwart the will of a testator. . . . "Furthermore, it is the privilege and right of a party beneficiary to an estate at all times to seek a construction of the provisions of the will. An action brought to construe a will is not a contest within the meaning of the usual forfeiture clause, because it is obvious that the moving party does not by such means seek to set aside or annul the will, but rather to ascertain the true meaning of the testatrix and to enforce what she desired."'" (*Estate of Black* (1984) 160 Cal.App.3d 582, 588, quoting *Estate of Kruse* (1970) 7 Cal.App.3d 471, 476, quoting *Estate of Miller* (1964) 230 Cal.App.2d 888, 903; see also cases cited.)

However, "unequivocally assert[ing]" that a provision is invalid goes beyond merely seeking an interpretation of it. (*Estate of Goyette* (1968) 258 Cal.App.2d 768, 773; accord, *Burch v. George*, *supra*, 7 Cal.4th at p. 263, fn. 11.) Virginia's petition

demanded income payments. Rather coyly, it failed to explain how she could be entitled to them when she had not yet conveyed the RV. At some point, however, she had to make her position clear to the trial court if she wanted it to rule in her favor. Thus, in her trial brief, she plainly and unequivocally asserted that the RV condition was invalid. She thereby sought, not to determine the trustor's intent, but to defeat it. Thus, she violated the no contest clause.

If we had any doubt on this point, we would be guided by the intention of the trustor. Even a proceeding that *does* merely seek an interpretation can violate a no contest clause, provided that is what the trustor intended. For example, in *Estate of Ferber, supra*, 66 Cal.App.4th 244, the no contest clause disinherited any person who "'objects to any construction or interpretation of my Will, or any provision of it, that is adopted or proposed by my Executor . . . .'" (*Id*. at p. 248.) The will gave one beneficiary (Richard) any property of which he and the testator were "co-owners." (*Id*. at p. 255.) After Richard was named executor (see *id*. at pp. 247-248), another beneficiary (Sandra) sought declaratory relief concerning the meaning of "co-owners." She argued that it excluded any property that the testator had co-owned with Richard *and* Richard's wife. (*Id*. at p. 249, 255.) The appellate court held that the proposed proceeding would violate the no contest clause, "because Sandra's proposed petition regarding the term 'co-owner' seeks an interpretation of the term different from Richard's . . . ." (*Id*. at p. 250.)

Here, the no contest clause could be triggered *either* by a contest *or* by the assertion of "any other claims, of whatever nature and whether arising by statute or

otherwise, by any taker hereunder . . . ." The trust purported to dispose of the RV, giving Virginia a life interest and giving Randy a time-share as well as the remainder. Even assuming that Virginia was merely seeking an interpretation, she claimed that an interpretation was necessary -- and, moreover, that her interpretation was correct -- *because* she owned the RV. This constituted the assertion of an "other claim" to property that the trustor clearly intended to be subject to the trust.

Alternatively, the trial court may have reasoned that disinheriting a beneficiary who invokes Probate Code section 17200 would violate public policy. (See, e.g., *Graham v. Lenzi* (1995) 37 Cal.App.4th 248, 256-258.) Section 17200, however, authorizes a wide range of proceedings, including proceedings to "[d]etermin[e] the validity of a trust provision." (*Id*., subd. (b)(3).) Moreover, this list "is not exclusive and is not intended to preclude a petition for any other purpose that can be characterized as an internal affair of the trust." (Cal. Law Revision Com. com., reprinted at 54A West's Ann. Prob. Code (1991 ed.) foll. § 17200, p. 194.) As Virginia points out, section 17200 has been held to permit the trial court to determine whether certain real estate is trust property (*Estate of Heggstad* (1993) 16 Cal.App.4th 943, 951-952), whether an amendment to a trust is valid (*Conservatorship of Irvine* (1995) 40 Cal.App.4th 1334, 1341-1342), and whether a trust should be modified (*Stewart v. Towse* (1988) 203 Cal.App.3d 425, 428-429).

It is hard to imagine any contest that could *not* be brought under Probate Code section 17200. Thus, adopting the trial court's reasoning would cripple the utility of no

contest clauses. Precisely because the statute is so broad and general, it does not state any ascertainable public policy. It is essentially procedural, not substantive. Arguably, if a trust provision purported to bar a beneficiary from filing a proceeding under section 17200 *at all*, the result might be different. (See Cal. Law Revision Com. com., reprinted at 54A West's Ann. Prob. Code (1991 ed.) foll. § 17200, p. 195.) In this case, however, the no contest clause simply precluded a beneficiary from using section 17200 (or any other procedure) for the purpose of contesting the trust. In *Burch v. George*, *supra*, 7 Cal.4th 246, the Supreme Court held that a no contest clause can be used to force a spouse to elect between his or her statutory community property rights and his or her rights under a trust (*id*. at pp. 257-258); if that is not against public policy, then neither is using a no contest clause to force a beneficiary to elect between his or her statutory right to invalidate a trust provision and his or her other rights under the trust.

We therefore hold that Virginia violated the no contest clause. This poses a nice question concerning the appropriate appellate remedy. When the trial court ruled that Virginia had not violated the no contest clause, it also ruled that the RV condition was a condition precedent to her right to receive any payments from the trust, and it ordered her to convey the RV to the trust within 30 days. Virginia has advised us (and Chris does not dispute) that she complied with this order on or about November 22, 2002.

We think it goes without saying that, if Virginia had known that she had actually violated the no contest clause, she would never have conveyed the RV. It would be unjust enrichment to let the trust keep the RV, yet deny Virginia her life estate in the RV

or any of the other benefits to which she would have been entitled. Virginia acted in good-faith reliance on a judgment that we must now reverse. Meanwhile, the trust, also acting in good-faith reliance on the judgment, has been free to use the RV. Presumably it has paid the registration fees. It may have repaired it or even improved it. On the other hand, for all we know, the RV has been in a crash and totaled. Even if not, by the time our remittitur issues, anything could happen.

We also note that Chris was claiming that Virginia was not entitled to take sole title to the RV. Because the trial court ordered Virginia to transfer the RV to the trust based on the RV condition, Chris has had no opportunity to litigate this issue. We express no opinion, however, with respect to whether the judgment that Virginia owns the *Saturn* is in any way res judicata, collateral estoppel, or law of the case as to the *RV*.

We will therefore remand with directions to the trial court that, if it finds that Virginia was entitled to full ownership of the RV, it shall exercise its equitable discretion to return the parties to the same positions with respect to the RV that they were in before Virginia conveyed the RV to the trust, to the extent possible and to the extent consistent with the rights of third parties. (Code Civ. Proc., § 908; see also Prob. Code, § 1000.) This means that, unless it finds countervailing considerations not apparent from the appellate record (and, of course, unless it finds that Virginia was not entitled to full ownership of the RV), the trial court shall order the trust to return the RV to Virginia. In the exercise of such discretion, the trial court may prescribe reasonable terms and

conditions, including, but not limited to, the payment of appropriate monetary compensation.

In light of this disposition, Chris's contention that Virginia failed to satisfy the RV condition within a reasonable time is moot.

IV

ORDERING THE TRIAL CLOSED TO EVIDENCE

Chris contends that, in the second phase of trial, the trial court erred by refusing to let her finish presenting evidence.

A. *Additional Factual and Procedural Background.*

When the second phase of trial began, Chris's counsel announced that he intended to call a total of three witnesses. He was allowed to call Chris's expert out of order. Virginia's counsel called Virginia. Virginia then rested.

At that point, the trial court commented: "Before we go on, I want to make sure I get a couple things straight . . . ." A discussion of some of the legal issues ensued. Chris's counsel repeatedly stated that he intended to introduce evidence that the community expenses "far, far exceeded any of this community income." He argued that this evidence would be relevant to show, by tracing, that only separate property funds had been spent on the improvements to the house. He also suggested -- in retrospect, perhaps unwisely -- that this evidence would be voluminous:

"[CHRIS'S COUNSEL:] [W]e . . . have . . . as much detail as the Court . . . can tolerate essentially . . . . [¶] . . . [¶][6]

"THE COURT: The issue is to save time whether there is a stipulation that, yeah, they spent far more than they earned and they had to go into his separate property money that helped support the marriage. [¶] . . . [¶] . . . I am not sure we have to put on all that evidence. [¶] . . . [¶]

"[VIRGINIA'S COUNSEL]: I don't think we have to put on that evidence. I mean, that is how they chose to support the marriage at the time. . . .

"THE COURT: I really think unless you want to put [Chris] on the stand, I really think we have an agreement with all the facts at this point. [¶] . . . [¶] . . . You are making an offer of proof which takes away the trier of fact's finding. . . . [¶] . . . [¶] . . . I need that briefed. [¶] . . . [¶] . . . I don't need any more factual evidence. [I]t is abundantly clear that the incomes were commingled. [¶] . . . [¶]

"[CHRIS'S COUNSEL]: Right. [B]ut the cases allow us to do tracing. . . . [¶] . . . [¶]

"THE COURT: I think your offer of proof has -- your first item I am not buying completely because everything is commingled. When you said you had an offer of proof, I thought, okay, he is going to be able to put somebody on and say, look, here is where

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6 Later, he added: "[W]e can go through that . . . [¶] . . . [¶] . . . in rather nauseating detail."

this money was spent on this date and here was the money that came in from separate property -- [¶] . . . [¶]

"[CHRIS'S COUNSEL]: Yeah. Yeah. That can be done. We can do it. We have got it all -- all indexed, very organized. It may take a long time, but we can do that. . . .

"[VIRGINIA'S COUNSEL]: But the exhibits that you have already --

"[CHRIS'S COUNSEL]: With the exhibits we have already.

"THE COURT: Well, I think that's factual testimony. We have to take -- [¶] I assume you want to cross-examine? [¶] . . . [¶]

"[VIRGINIA'S COUNSEL]: But, I mean, we have to -- the legal issues have to be clearer, I think, and briefing that is -- just what do you want me to brief, what do you want them to brief, and do you want us to --

"THE COURT: This thing has just gone on for so long. I gave you the areas I want briefed. [¶] . . . [¶] . . . If [Chris's counsel] is right . . . , then we are going to have to put on the evidence of that.

"[VIRGINIA'S COUNSEL]: Yes. But I -- I appreciate the briefing points so we can at least -- we have to do it anyway, so if we brief it and we can come to some legal conclusion, anything that we can do to shorten this matter is good with me.

"THE COURT: Well, . . . we can start that testimony now and we will go to --

"[VIRGINIA'S COUNSEL]: I would rather brief the issues first, your Honor. That way --

"THE COURT: Then we are going to have to pick a date to come back."

The trial court ordered the parties to file further briefs. It continued the "evidentiary hearing" to December 3. However, it also stated that it would "put out some kind of tentative" on the "legal issues."

In Chris's further brief, she stated: "The trial went into recess before Chris presented all of her evidence. As stated in court, she intends to establish that all funds used to improve Lee's separate property house were his separate property funds." Her brief concluded: " . . . Chris respectfully requests that the court recommence the evidentiary proceedings consistent with the legal authorities presented herein." Along with the brief, she submitted a supplemental exhibit list.

At the continued hearing, the trial court noted, "[Chris's counsel] wants to present more evidence regarding the assets." Shortly afterward, however, it announced, "A couple of issues that I am prepared to rule on and then I will discuss with you other issues." It then tentatively ruled that Virginia was entitled to reimbursement because, even assuming only Lee's separate property was used to make the improvements, this use was essentially either support for Virginia or a gift.

After a lengthy oral argument, the trial court asked the parties to "rebrief" certain issues. It then announced: "We are not going to have any more hearings. [¶] . . . [¶] . . . We are going to brief the matter so I can take it under submission and get briefs. [¶] . . . [¶] I don't like taking these cases under submission, but there is no choice here." It concluded by declaring: "Okay. So the matter is under submission."

When the trial court issued its written decision, it ruled that Virginia was entitled to reimbursement for the money spent to improve the house. It explained: "[A]ll of these expenses came about . . . when the couple had community income from the sale of the Shaklee products. The Court's standard would be first-in/first-out of the community account, and the Court could not determine from the evidence which of the co[m]mingled monies w[ere] spent on the improvements."

When Chris filed objections to the proposed judgments, she also requested a further evidentiary hearing. She claimed she had not been allowed to present all of her evidence. She attached copies of five of the exhibits on her supplemental exhibit list. She argued that the exhibits on her original exhibit list and/or her supplemental list would show that only separate funds had been spent on the improvements.

The trial court overruled Chris's objections and denied her request for a further evidentiary hearing.

B. *Analysis*.

The trial court never really explained why it was truncating the hearing. From the comments it made leading up to that point, however, it seems clear that it considered Chris's proffered evidence irrelevant, in the sense that it would not change the ruling the trial court otherwise intended to make.

Its tentative ruling was that Virginia was entitled to reimbursement for the improvements *even if* only Lee's separate funds were used to make them. It suggested two (or possibly three) alternative lines of reasoning in support of this conclusion. It is

not clear whether it relied on any of them; toward the very end of the hearing, it indicated that it was reconsidering them, and its subsequent written decision used entirely different reasoning, as we will discuss below. It does not matter, however, because they were all erroneous.

First, the trial court suggested that the separate funds were in the nature of support. A spouse cannot reclaim separate funds that have been used to support the other spouse prior to separation. (*In re Marriage of Epstein* (1979) 24 Cal.3d 76, 80; *See v. See* (1966) 64 Cal.2d 778, 784.) Here, however, if Lee spent his own separate property funds to improve his own separate property asset, those funds in no way went to support Virginia.

True, Virginia did live in the house, but expenditures that increased its capital value cannot be considered part of her support. For example, if Lee built a room add-on, Virginia would be free to use the new room, and its use value could be viewed as support. Arguably the depreciation on the new room could also be viewed as support. Virginia, however, consumed and used up any such support, just as she consumed and used up any food or electricity that Lee provided. Virginia's use did not add value to the house; hence, the community could hardly expect reimbursement for it.[7] Lee could still

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[7] For the same reason, if Lee used his separate funds to maintain (rather than to improve) his own separate property house, such maintenance could be viewed as support; however, it would not give the community a right of reimbursement.

By saying so, we are not deciding whether the community would be entitled to reimbursement for *community* funds used to maintain (rather than to improve) a separate property home.

properly expect to recover the entire capital value of the hypothetical new room (minus depreciation) if and when the house was sold.

Second, the trial court suggested that the separate funds were a gift to the community. Again, however, because they were used to improve a separate property asset, there was no evidence of any donative intent. Moreover, because the improvements were "substantial in value," and were not "clothing, wearing apparel, jewelry, or other tangible articles of a personal nature . . . used solely or principally by" Virginia (Fam. Code, § 852, subd. (c)), they could not be transmuted to community property without an express written transmutation. (*Id*., subd. (a); see *In re Marriage of Steinberger* (2001) 91 Cal.App.4th 1449, 1463-1466.)

Third, at trial, Virginia argued that, because Lee had added her name to the Wells Fargo account, any separate funds deposited in it automatically became community. At times the trial court appeared to accept this theory; at other times, however, it appeared to reject it. This theory, too, was erroneous.

Probate Code section 5305, subdivision (a), as relevant here, provides: "[I]f parties to an account are married to each other, . . . the account is presumed to be and remain their community property." Ordinarily, this presumption can be rebutted by tracing. (*Id*., subd. (b)(1).) It cannot be rebutted by tracing, however, and thus it essentially becomes conclusive, if the spouses have "made a written agreement that expressed their clear intent that the sums be their community property." (*Ibid*.) Virginia argued that the signature card for the Wells Fargo account constituted such a written

agreement. However, if a signature card alone would suffice, tracing would almost *never* come into play. Almost *any time* a bank account stands in the name of both a husband and a wife, there is such a signature card. Moreover, although the signature card itself has not been transmitted to us (see Cal. Rules of Court, rule 18), according to Virginia, it provided that the account was held in joint tenancy, not as community property. Thus, it did not "express[] a clear intent" that the funds deposited in the account were to be community property.

In light of Probate Code section 5305, Chris's proffered evidence that community expenses exceeded community income was highly relevant. "Under the 'family living expense' or 'recapitulation' method, it is assumed that family living expenses are paid out of community property funds. [Citations.] Payments may be traced to a separate property source by showing community income at the time of the payments or purchase was exhausted by family expense, so that the payments or purchase necessarily must have been made with separate property funds. [Citations.]" (*In re Marriage of Braud* (1996) 45 Cal.App.4th 797, 823.)

In sum, if the trial court concluded, as its oral comments suggested, that this evidence was irrelevant, it erred. There was no valid legal theory under which the evidence was irrelevant. In something of a bait-and-switch, however, in its subsequent *written* decision, the trial court ruled that Virginia was entitled to reimbursement for an entirely *different* reason: "[A]ll of these expenses came about . . . when the couple had community income from the sale of the Shaklee products. The Court's standard would

be first-in/first-out of the community account, and the Court could not determine from the evidence which of the co[m]mingled monies w[ere] spent on the improvements." In other words, it ruled against Chris precisely *because* she had not proven that only separate funds were spent on the house. On this view, once again, Chris's proffered evidence was highly relevant. We conclude that the trial court erred by excluding this evidence.

Virginia argues that the error was harmless because the trial court "had substantial evidence on which to base its decision." That, however, is not the test. Indeed, if it were, the erroneous exclusion of evidence would almost never be prejudicial. Rather, the test is whether "it is reasonably probable a result more favorable to the appellant would have been reached absent the error. [Citations.]" (*In re Marriage of Smith* (1978) 79 Cal.App.3d 725, 751.) Here, because the trial court *expressly* based its ruling on a finding that Chris had not met her burden of proof, that test is satisfied.

Virginia therefore also argues that Chris's objections to the proposed judgment discussed the excluded evidence; since the trial court overruled the objections, it must have found this evidence unpersuasive. We do not know, however, *why* the trial court overruled the objections. Virginia asserted below that they were untimely. (See Cal. Rules of Court, rule 232(e).) Alternatively, the trial court may simply have reasoned that it had properly excluded this evidence at trial.

It seems likely that, if the trial court *had* considered the excluded evidence, it would have ruled in favor of Chris. That evidence made at least a prima facie showing

that the community expenses *did* far outstrip the community income. For example, Exhibit 191 summarized the couple's income and expenses, based on meticulous back-up documentation. It showed that, in 1994 through 1998, they had community income of $16,801, but community expenses of *$207,629*.[8]

The trial court relied in particular on the fact that the couple had community income from the Shaklee business. Exhibit 191, however, included tax returns showing that the Shaklee business produced only net losses; that was true even if "paper" losses, such as depreciation, were not taken into account. Exhibit 191 also included detailed records of deposits and withdrawals indicating that little or none of the Shaklee income went into the Wells Fargo account.[9] In her objections, Chris offered to introduce records of other bank accounts tending to show where the Shaklee income actually went and, moreover, that the Shaklee business lost money.

Virginia referred to Exhibit 191 in her testimony, so the trial court knew it existed, but Chris had no opportunity to authenticate it properly, and the trial court never admitted it. Individual income and expense items in Exhibit 191 are open to debate, and one might quibble over some of the methods used in it to arrive at summary figures; still, on the whole, Exhibit 191 is compelling. We cannot see how the trial court could have

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[8] Even in 1993 -- the only year in which Lee and Virginia were employed -- they had community income of $36,114, but estimated community expenses of $42,002.

[9] Virginia never testified that all of the Shaklee income went into the Wells Fargo account, only that some of the money in the Wells Fargo account was Shaklee

[footnote continued on next page]

considered Exhibit 191 and the other documents attached to Chris's objections, yet have concluded that Chris had *not* met her tracing burden. It follows that the exclusion of this evidence was prejudicial.

Chris also contends the trial court erred by excluding two additional classes of evidence.

First, Chris contends the trial court erred by excluding evidence that Lee's separate funds were used to buy the Saturn and the RV. We note that, in the second phase of trial, there was no issue concerning the RV; in the first phase of trial, the trial court had already ordered Virginia to convey the RV to the trust. Moreover, the trial court's reason for ruling that Virginia was entitled to the Saturn had nothing to do with whether it was purchased with separate or community funds. Rather, the trial court relied on Vehicle Code section 5600.5, subdivision (a), which provides that, when a vehicle is registered in the names of two alternative co-owners, using the word "or," "[e]ach coowner shall be deemed to have granted to the other coowners the absolute right to dispose of the title and interest in the vehicle." It therefore concluded that Virginia had the absolute right to transfer the Saturn to herself. In this appeal, Chris never argues that this reasoning was erroneous in any way; thus, she has waived any such argument. We conclude that any error in excluding evidence relevant to tracing the funds used to buy the Saturn was harmless.

[footnote continued from previous page]
income. In any event, if she had so testified, Chris would have been entitled to offer documentary evidence contradicting her.

Second, Chris contends that the trial court erred by excluding evidence that Virginia breached her fiduciary duty by transferring the Saturn and the RV to herself. Once again, we note that there was no issue concerning the RV. Moreover, even though the trial court ruled tentatively that the Saturn belonged to Virginia, Chris did not make any offer of proof on the fiduciary duty issue. Accordingly, she waived the asserted error. (Evid. Code, § 354.)

For these reasons, we will reverse the judgment to the extent that it awarded Virginia reimbursement for the funds spent on improvements to the house. However, we will affirm the judgment to the extent that it awarded the Saturn to Virginia.

V

DISPOSITION

To the extent that the judgment rules that Virginia did not violate the no contest clause, it is reversed. On remand, it shall be deemed established that Virginia has violated the no contest clause.

To the extent the judgment rules that the RV condition is a valid and enforceable condition precedent, it is affirmed. On remand, however, the trial court is directed that, if it finds that Virginia was entitled to take sole title to the RV, it shall exercise its equitable discretion to return the parties to the same positions with respect to the RV that they were in before Virginia conveyed the RV to the trust, to the extent possible and to the extent consistent with the rights of third parties. This means that, unless it finds countervailing considerations not apparent from the appellate record (and unless it finds that Virginia

was not entitled to full ownership of the RV), the trial court shall order the trust to return the RV to Virginia. In the exercise of such discretion, the trial court may prescribe reasonable terms and conditions, including, but not limited to, the payment of appropriate monetary compensation.

To the extent that the judgment rules that Virginia is entitled to reimbursement for funds spent on improvements to the house, it is reversed.

To the extent that the judgment rules that the Saturn is Virginia's property, it is affirmed.

Chris is awarded costs on appeal against Virginia.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P.J.

HOLLENHORST
J.